



#### In this issue:

- U.N. General Assembly Resolutions on Oceans and Sustainable Fisheries **2**
- Environmental Law Tips for the Generalist **2**
- Oil Spill Response: A Commanding Officer's Guide **3**
- New Department of the Interior Opinion on Criminal Takes under the Migratory Bird Treaty Act **5**

# LEGACY

The Newsletter of the Navy JAG Corps Environmental Law Community

"Operating in an environmentally sound manner is the Navy legacy for the 21st century. It's the Navy's way of life."  
Naval Warfare Publication 4-11, "Environmental Protection"



Volume 18.1

January 2018

## From the Director . . .

CDR Brendan Burke, JAGC, USN

Welcome to the inaugural issue of *Legacy*, the newsletter of the Navy JAG Corps Environmental Law Community! We are excited to bring you this product with updates on what's going on in the community as well as legal topics of interest to both environmental law specialists and the wider JAG Corps community.

After considerable debate, head-scratching, and arm-wrestling, we came up with *Legacy* as the title for your newsletter. This is a fitting title for a few reasons. First, as the quote in our masthead emphasizes, environmental stewardship is a very important part of our Navy's legacy. Every day our community helps commanders and senior leaders execute their important operational and readiness missions in ways that protect that legacy without sacrificing security. That advice and support becomes your legacy to our client and supported commands. And finally, we hope that this newsletter itself and the important information in it will become part of the Environmental Law Division's legacy to the community.

This is your newsletter, and we need your help to keep it going. Please contact me or *Legacy's* editor, Lieutenant Commander David Shull, if you have any suggestions about how to make the newsletter better, or topics you would like to see us cover. Consider this the first of many open invitations to author and submit newsletter articles. You are each working on many interesting legal issues, and our community and client organizations would love to hear about them!

I am proud of this first issue of your community newsletter. It is one of many steps we are taking in Code 12 to share information and enable your practice. Watch this space in the next issue for more details on other initiatives. In the meantime, enjoy this issue of *Legacy*!

JAG Corps Environmental Law Community practitioners are encouraged to register for the Combined Legal Community Environmental Law Community of Practice (ELCOP) hosted by the Department of the Navy Office of the General Counsel. See the Code 12 SharePoint portal page for details on how to access ELCOP.

The Environmental Law Division (Code 12) provides legal advice, assistance, research, interpretation, representation, and training involving environmental and energy laws and policy issues as they pertain to Fleet training, testing, and naval operations, as well as environmental compliance ashore.

**Director**  
Commander Brendan Burke

**Office of the Judge Advocate General**  
Environmental Law Division (Code 12)  
1322 Patterson Ave. SE, Suite 3000  
Washington Navy Yard DC 20350-2000

**Deputy Director  
Newsletter Editor**  
Lieutenant Commander David Shull

## U.N. General Assembly Resolutions on Oceans and Sustainable Fisheries

LCDR David Shull, JAGC, USN

In December 2017, the U.N. General Assembly (UNGA) adopted two resolutions to advance implementation of the U.N. Convention on the Law of the Sea (UNCLOS) and support the conservation and management of straddling and highly migratory fish stocks and other marine life in areas beyond national jurisdiction. Neither resolution directly impacts U.S. naval operations, but fleet and environmental law judge advocates should keep in mind the effects these resolutions can have on international norms.

A/RES/72/L.18, *Oceans and the law of the sea* (the Oceans resolution), was adopted on December 5, 2017, by 128 votes to 1 (Turkey voting against) with three abstentions (Columbia, El Salvador, and Venezuela). A/RES/72/L.12, *Sustainable fisheries* (the Fisheries resolution), was adopted the same day by a vote of 126 to 1 (United States voting against) with 3 abstentions (El Salvador, Turkey, and Venezuela).

The Oceans resolution, an annual omnibus resolution, enjoyed strong support with the exception of Turkey, which objected to references in the text to UNCLOS, to which Turkey is not a party. The resolution addresses a range of issues including the UNGA's concern about climate change and the vulnerability of the environment and the fragile ecosystems of the polar regions, capacity building, effective protection of the marine environment and the protection and conservation of the natural resources of the Area, piracy and armed robbery at sea, and assistance to persons in distress at sea. The resolution also welcomes the Paris Agreement and encourages its full implementation, and notes the International Maritime Organization's approval of guidelines for the reduction of underwater noise from commercial shipping. Further, the resolution notes progress by the International Seabed Authority on draft regulations for the exploitation of mineral resources in areas beyond national jurisdiction.

The Fisheries resolution also enjoyed strong support. The only vote against came from the United States, which objected to references to the

World Trade Organization negotiations on fisheries subsidies and special treatment for developing countries. The U.S. supported the rest of the resolution. The resolution addresses achieving sustainable fisheries, combating illegal, unreported, and unregulated fishing, fishing overcapacity, and improving regional and sub-regional cooperation to achieve sustainable development. The resolution also highlights the importance of responsible fishing practices, criticizing the continued practice of large-scale pelagic drift-net fishing.

Finally, the UNGA declared 2021-2030 as the "Decade of Ocean Science for Sustainable Development" to promote international cooperation on research and scientific programs, observation systems, capacity development, and maritime space planning to better manage ocean and coastal zone resources and reduce maritime risks. The campaign will employ thousands of scientists to study, among other things, the cumulative effects of human activities on the oceans, including the impact of pollution, ocean warming, and acidification. The Decade of Ocean Science aims to advance the achievement of Sustainable Development Goal 14 for the conservation and sustainable use of the ocean, seas and marine resources.

## Environmental Law Tips for the Generalist

LCDR David Shull, JAGC, USN

The Navy's Environmental Readiness Program Manual, OPNAV M-5090.1, is your primary reference for environmental compliance policies and procedures applicable to all Navy activities. Program areas include environmental planning under the National Environmental Policy Act and Executive Order 12114, natural resources conservation, cultural resources compliance and management, coastal zone management, environmental compliance ashore (including clean air, clean water, and waste management), environmental compliance afloat (including permitted ocean disposal), and spills and natural resource damage. Legal questions, including interpretations of laws, regulations, executive orders, permits, compliance agreements, and similar legal documents, should be coordinated with the appropriate region, fleet, or OJAG environmental counsel.

## Oil Spill Response: A Commanding Officer's Guide

LCDR David Shull, JAGC, USN

Chapter 39 of OPNAV M-5090.1 details the response requirements for oil and hazardous substance (OHS) spills from Navy vessels and shore facilities. The following is a step-by-step commander's guide to follow in the event of an oil spill from a Navy facility or vessel:

1. Take immediate, direct actions to contain, control, and mitigate the effects of a Navy spill upon the environment. Navy will always assume initial responsibility to mitigate the effects of the spill.

- ▶ Navy will provide immediate spill response assistance, regardless of fault, where a collision between a Navy vessel and non-Navy vessel or structure results in a spill from the non-Navy vessel.

- ▶ Navy will manage response to spills from vessels owned, operated, or chartered by Military Sealift Command.

2. Immediately notify the designated shore-based Navy On-Scene Coordinator (NOSC) who, in most cases, is the Navy Regional Environmental Coordinator (REC). NOSCs are predesignated by the naval forces commander or Commander, Navy Installations Command.

3. Implement the applicable NOSC plan and, for activities outside the United States, review relevant final governing standards and host nation reporting requirements. For activities within the United States, review applicable requirements to notify state and local authorities.

4. For spills from Navy vessels between zero and 12 nautical miles (NM) from the U.S. coast or from shore activities in the United States: Notify the National Response Center (NRC) immediately using the 24-hour toll free number (800) 424-8802 or (202) 267-2675. The NRC is the 24-hour spill notification center, located at U.S. Coast Guard (USCG) Headquarters in Washington, D.C. It is the single Federal notification point (outside the Navy chain

of command) for emergency spill response and is responsible for notifying the predesignated Federal On-Scene Coordinator (FOSC) of reported oil spill incidents. Commands shall not delay NRC notification to obtain more detailed information about the incident. Immediate voice notification to the NRC fulfills all Federal notification requirements. If reporting activities cannot reach the NRC by voice on the first attempt, they shall immediately notify the nearest EPA office or USCG station. Reporting to EPA or USCG does not relieve the spiller of the responsibility to report to the NRC. Reportable spills include:

- ▶ Spills that are harmful to the environment; discharges greater than 15 parts per million (ppm) of oil which cause a film or sheen upon, or discoloration of, the surface of navigable water or adjoining shorelines, or causes a sludge or emulsion to be deposited beneath the surface of such waters or adjoining shorelines;

- ▶ Any discharge of oil that threatens to reach the navigable waters of the United States;

- ▶ In the event of a fire, explosion, or other release on a Navy facility within the United States which could threaten human health outside the facility or when a spill has reached surface water.

- ▶ When in doubt, Navy personnel shall be mindful of environmental stewardship responsibilities and report. *Continued on next page.*





## Oil Spill Response

*Continued from page 3.*

5. Depending upon the location of the oil spill, EPA or USCG assumes the role of the FOSC. The NOSC should maintain control of the Navy's response efforts unless the EPA or USCG FOSC determines Navy's response is inadequate or inappropriate.

6. For spills outside 12 NM from the U.S. coast, report the spills to the chain of command and the fleet NOSC. The fleet NOSC shall report spills occurring within 200 NM of the U.S. coast to the NRC within 24 hours of receiving the initial report from the spilling vessel and implement the applicable fleet NOSC plan.

7. For spills in foreign ports, immediately notify the chain of command and the appropriate NOSC.

8. If the cause of the spill cannot be addressed at sea and the vessel must return to port for repairs with the potential for additional spillage in port, it is prudent to notify the designated shore-based NOSC at the repair site and, if the ship will pull in to a foreign port, to review relevant final governing standards and host nation requirements.

9. Report oil spills to Navy leadership in accordance with Navy reporting procedures. Reports shall be made through the chain of command and NOSC as follows: (a) by voice report immediately upon discovering the spill; (b) by official Navy message as soon as practicable; and (c) by updated message as soon as the reporting activity becomes aware of new information concerning the origin, quantity, type,

operation under way, root cause, or lessons learned of the spill. Reporting to the Navy chain of command does not relieve the spiller of the responsibility to report applicable spills to the NRC.

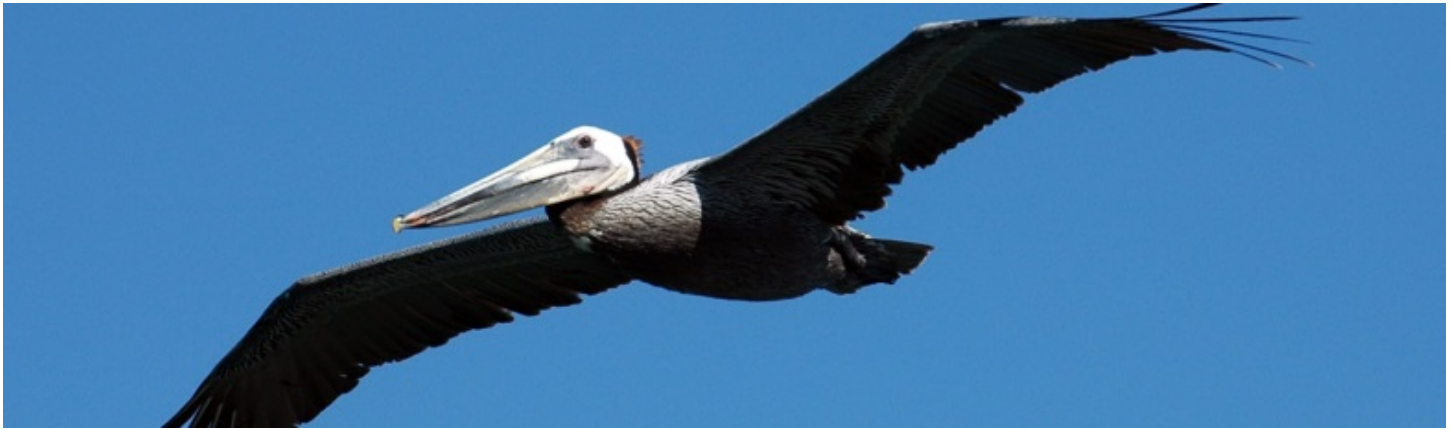
10. A reporting template for oil spills is located in Appendix C-3 to OPNAV M-5090.1. Reportable spills include: (1) any spill reported to the NRC, state, or local authorities; (2) spills that are harmful to the environment; discharges greater than 15 parts per million (ppm) oil which cause a film or sheen upon, or discoloration of, the surface of navigable water or adjoining shorelines, or causes a sludge or emulsion to be deposited beneath the surface of such waters or adjoining shorelines; (3) any spill that may endanger critical water areas, have the potential to generate public concern, become the focus of an enforcement action, or pose a threat to public health or welfare that warrants an operations event and incident report (OPREP 3). Report all spills discovered by Navy personnel that meet the above criteria, whether attributable to Navy sources or not, and even if the cause or source of the spill is unknown.

11. The OPREP 3 reporting system should be used – in addition to the oil spill message discussed above – for any spills resulting from catastrophic events, endangering critical water areas, causing or having the potential to cause significant adverse public reaction, becoming the focus of an enforcement action, posing a threat to public health or welfare, or having geopolitical implications. Sending an OPREP 3 does not substitute for the requirement to submit the oil spill message detailed in Appendix C-3.

## UPCOMING EVENTS

Mark your calendar for the following training and other opportunities:

Code 12 Environmental Law Overview • February 9, 2018 • Region Legal Service Office Northwest  
Code 12 Environmental Law Overview • February 21, 2018 • Region Legal Service Office Southeast  
Air Force Advanced Environmental Law Course • February 27-28, 2018 • Andrews Air Force Base, Maryland  
2018 AICUZ Workshop • February 27-28, 2018 • Fort Sam Houston, Texas  
Civil Engineering Corps Officers School (CECOS) NEPA Application • February 27 - March 1, 2018 • Hawaii  
CECOS Advanced Environmental Law • April 24-27, 2018 • Washington, D.C.



## New Department of the Interior Opinion on Criminal Takes Under the Migratory Bird Treaty Act

LCDR Carrie Greco, JAGC, USN

In December, the Department of Interior's (DOI) Office of the Solicitor issued a legal opinion (M-37050 of 22 Dec 2017, *available on the Code 12 SharePoint portal*) narrowing the scope of criminal takes under the Migratory Bird Treaty Act (MBTA) to prohibit only purposeful actions, rendering incidental takes no longer subject to criminal sanction.

The DOI memorandum states that, consistent with the text, history, and purpose of the MBTA, the statute's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have *as their purpose* the taking or killing of migratory birds, their nests, or their eggs.

This memorandum reverses DOI's previous interpretation (Opinion M-37041), and concludes that the prior opinion improperly conflated *mens rea* and *actus reus* as applied to MBTA's strict liability provisions for misdemeanor violations. The relevant acts prohibited by the MBTA, the new opinion concludes, are purposeful and voluntary affirmative acts directed at reducing an animal to human control. For example, a hunter who shoots a migratory bird without a permit in the mistaken belief that it is not a migratory bird may be strictly liable for a "taking" under the MBTA without proof of intent to kill a protected bird because he engaged in an intentional and deliberate act toward the bird. Liability does not attach to actions the plain object of which does not include rendering an animal subject to human

control. Accordingly, a person whose car accidentally collided with a protected bird has committed no act for which he could be held strictly liable. Nor do the owners of electrical lines "take" migratory birds that run into them, even if such a result is reasonably foreseeable. *See, e.g., United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 492-93 (5th Cir. 2015); *Mahler v. United States Forest Service*, 927 F. Supp. 1559, 1581 (S.D. Ind. 1996).

The opinion also cites differing court opinions regarding the scope of the MBTA and concludes that these differences create ambiguity in the criminal enforcement of the statute, giving rise to serious constitutional due process concerns. Courts of Appeals in the Second and Tenth Circuits have held that the MBTA criminalizes some instances of incidental take. Courts of Appeals in the Fifth, Eighth, and Ninth Circuits have indicated that it does not. In such circumstances, according to the new opinion, due process warrants a narrower construction consistent with the rule of lenity.

This opinion generated a range of responses. In a letter to DOI Secretary Zinke, former federal officials criticized the opinion, arguing that this new standard is contrary to the long-standing interpretation of every administration and creates a "huge loophole," allowing industry to engage in activities that previously would be considered violations of the MBTA, so long as they were not intending to "render an animal subject to human control."<sup>1</sup> The letter's authors acknowledge disagreements in interpretation of the law at the fringes, (*continued on next page*)

## Migratory Bird Treaty Act

*Continued from page 5.*

but conclude that “strict liability must be tempered with common sense notions of reasonable foreseeability with readily available alternatives.” The authors urge a balanced approach between development and conservation in order to preserve the MBTA as a tool “to reduce gross negligence by companies that simply do not recognize the value of birds to society or the practical means to minimize harm.”

Public comments indicate that the energy industry favors this new approach. Energy sector proponents assert that their actions can now proceed without the uncertainty and fear of potential criminal violations.<sup>2</sup> Before the opinion was issued, various energy groups had been lobbying to introduce an amendment to an energy bill to abolish incidental takes from the MBTA.

Environmental groups, on the other hand, oppose this measure. Not only do they question why this change of interpretation is occurring now, during the “Year of the Bird”<sup>3</sup> and the hundredth anniversary of the MBTA, but they stress that the opinion removes decades of protections for migratory birds, provides no accountability for the deaths of millions of unprotected birds, and allows industry a “free pass” to act without regard to the impact to migratory birds.<sup>4</sup> Some environmental activists worry that industry will be less likely to invest in precautionary measures to prevent migratory bird deaths. Other environmental groups insist there is a need for balance, and that while the prior opinion was too sweeping, the new opinion is far too narrow.<sup>5</sup>

The MBTA is not the only regulation that protects migratory birds. The Bald and Golden Eagle Protection Act maintains protections against two species of eagles. The Endangered Species Act protects against acts that harm

threatened or endangered birds. Additionally, migratory birds remain protected from federal agency actions pursuant to Executive Order (EO) 13186 and a Memorandum of Understanding between the U.S. Fish and Wildlife Service (USFWS) and the Department of Defense. Additionally, agencies conducting planning under the National Environmental Policy Act (NEPA), which requires review of the impacts of major federal actions on the environment, consider these regulations in the review process.

There are good reasons for a restrained response to the new opinion. The opinion reflects a change in DOI’s interpretation of the law, but the change was not promulgated through notice and comment rulemaking and therefore may be given less deference by the courts. Additionally, the opinion is a DOI legal memorandum and, although perhaps unlikely, it is possible that the Department of Justice would consider it nonbinding and take a different view. Finally, the opinion does not resolve the split in the courts regarding the scope of the MBTA, and an environmental group may seek to enjoin federal agency actions in a judicial circuit favorable to the view that the MBTA criminalizes some instances of incidental take.

How does this impact Navy operations? Until changes are made to EO 13186, the USFWS-DOD MOU, and the USFWS rules to realign with the new interpretation, the

Navy has a continued obligation to protect and conserve migratory birds and their habitats. Additionally, after the changes are made, Navy personnel will have to continue to protect eagles and other endangered or threatened birds from harm, and evaluate the impacts to migratory birds in its NEPA actions. If unintentional take prohibitions are removed, the Navy may no longer be required to provide notice of unintentional takes, identify when unintentional takes are likely to have a measureable negative effect,  
*(continued on next page)*





## Migratory Bird Treaty Act

*Continued from page 6.*

or consult with USFWS when military readiness activities create a significant adverse impact. If an incidental take resulting in significant adverse impacts to migratory bird populations is anticipated during military readiness activities, the Navy may no longer be required to take actions to avoid, minimize, or mitigate this impact.

The Navy must carefully consider its future steps. Once new rule processes are developed and implemented, the Navy will continue to face the risk of future litigation from environmental groups, particularly in judicial circuits that interpret the MBTA to criminalize some instances of incidental take. This new opinion could generate more confusion, at least for the foreseeable future.

---

<sup>1</sup> Letter of Jan. 10, 2018 to The Honorable Ryan Zinke

<sup>2</sup> Comments of the National Ocean Industries Association and the American Petroleum Institute.

<sup>3</sup> [www.nationalgeographic.org/projects/year-of-the-bird/](http://www.nationalgeographic.org/projects/year-of-the-bird/)

<sup>4</sup> Comments of the National Audubon Society.

<sup>5</sup> Comments of the National Wildlife Federation.



Credit: Katherine Whitmore, USFWS

Code 12's SharePoint portal is being remodeled! Check it out! Browse the latest issue of *Legacy*. Discuss issues with others in the community. Stay on top of the latest environmental law news. Find live and online training opportunities. Conduct legal research. Review important announcements. Locate other judge advocates in the environmental law community. Read the newest Code 12 blog entries. Tell us what you think!

**[portal.secnav.navy.mil/orgs/JAG/12/SitePages/Home.aspx](http://portal.secnav.navy.mil/orgs/JAG/12/SitePages/Home.aspx)**